JD–21–10
Washington, DC

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DOWNTOWN BID SERVICES CORPORATION

Employer

and Case 5-RC-16330

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO,
DISTRICT LODGE 98

Petitioner

Patrick J. Cullen, Esq., and *Rachael Simon, Esq.,* for the Regional Director.
Anthony J. Marcavage, Esq., and *Bernard P. Jeweler, Esq.,* for the Employer.
William H. Haller, Esq., for the Petitioner.

ADMINISTRATIVE LAW JUDGE'S REPORT AND
RECOMMENDATIONS ON OBJECTIONS

BRUCE D. ROSENSTEIN, Administrative Law Judge. Pursuant to a petition filed on July 6, 2009[1] and a Stipulated Election Agreement entered into by the parties and approved on July 22, an election by secret ballot was conducted under the direction and supervision of the Regional Director, Region 5 of the National Labor Relations Board (the Board or NLRB) on July 30 and 31, in the following unit of employees.

> INCLUDED: All full time and regular part time hospitality/safety workers and maintenance workers employed by the Employer in Washington, D.C.
>
> EXCLUDED: All office clerical employees, professional employees, managers, guards and supervisors as defined in the Act.

The tally of ballots, which was made available to the parties at the conclusion of the election showed the following results:

Approximate number of eligible voters	117
Void ballots	1
Votes cast for Petitioner	56
Votes cast against participating labor organization	51

[1] All dates are in 2009 unless otherwise indicated.

Valid votes counted	107
Challenged Ballots	1
Valid votes counted plus challenged ballots	108

A majority of the valid votes counted have been cast for the Petitioner.

On August 7, the Employer filed timely objections to conduct affecting the results of the election. On February 18, 2010, the Regional Director issued a Report on Objections and Notice of Hearing finding that substantial and material issues of fact have been raised that can best be resolved by record testimony (Bd Exh. 1(g)). Accordingly, the Regional Director determined that a hearing should be held regarding the issues raised by the Employer.

I conducted a hearing on the below noted objections in Washington D.C. on March 4 and 5, 2010.[2] On the entire record, I make the following recommendations.[3]

BACKGROUND

District Lodge 98 Business Representative Roosevelt Littlejohn testified that he was contacted in or around March or April 2009 by Jennings Brown, a machine operator at the Employer. Brown was interested in organizing the employees and was seeking a labor organization that would be a good fit. Littlejohn and Brown held several meetings and ultimately Brown determined that the Petitioner would be an excellent choice to represent the employees for collective-bargaining purposes. Littlejohn encouraged Brown to seek out other interested employees and he would arrange a number of meetings wherein the employees could ask Littlejohn questions and seek information about organizing the Employer. Littlejohn treated Brown and several other employees to lunch when meetings occurred between them but other then this benefit, the employees received no other emoluments for agreeing to assist the Petitioner in organizing the Employer. Indeed, all Union literature, campaign propaganda and flyers were drafted by Littlejohn for dissemination by Union paid organizers or volunteer members of the in-plant supporters of which Brown was a member. Likewise, all meetings to discuss the Union at off-site locations were arranged and chaired by Littlejohn.

Littlejohn instructed members of the in-plant supporters committee, including Brown, on the framework of organizing employees but none of these individuals participated in any specific training on how to solicit union authorization cards from co-workers. After the cards were executed by the employees, they were given to Llittlejohn for safekeeping in preparation for the filing of the subject representation petition.

Littlejohn credibly testified that he never received any reports from the Employer or its employees that authorization cards were being solicited in less then a polite manner nor was Llittlejohn aware that some members of the in-plant supporters committee told employees that if they did not sign an authorization card or vote for the Union they could be terminated by the Union. According to Littlejohn, if such conduct did occur, it was not authorized or condoned by the Petitioner.

By letter dated June 16, Littlejohn informed the Employer that its employees had

[2] Post hearing briefs filed by the Petitioner and the Employer were duly considered.

[3] The undersigned will consider the alleged interference that occurred during the critical period, which begins on and includes the date of the filing of the petition and extends through the election.

selected the Petitioner as their collective-bargaining representative (Emp Exh. 6).

On July 6, the Petitioner filed a representation petition with the Board.

On July 30 and 31, an election was conducted under the supervision of Region 5 between the hours of 5:30 a.m. to 8:00 a.m. and 9:00 a.m. to 12:00 p.m. (Bd Exh. 1(d)). Brown served as the Petitioner's observer at all four sessions during the two day election period.

THE OBJECTIONS

The Employer filed Objections 1 through 5 alleging in pertinent part that the Petitioner threatened its employees by informing them that they would lose their jobs if they did not support the Petitioner, that the Petitioner harassed and intimidated its employees, that the Petitioner's observer used his cell phone at the polling location during election hours and named the Employer's observer to an unidentified party to whom he was speaking, that the Petitioner's observer addressed and embraced various voters during election hours, and the Petitioner interfered with the laboratory conditions necessary for a secret ballot election when it chose Brown as its observer, the party principally involved in coercing, intimidating and threatening its employees.

Objection 1

The Employer primarily alleges that Brown and several members of the in-plant supporters' committee, both before and during the critical period, informed employees that if they did not sign an authorization card for the Union, attend its meetings or vote for union representation, the Petitioner would have them fired.

Facts

Employee Ethel Frye testified that Brown, who she has known for approximately six years while serving on the same work team, told her on a number of occasions prior to the election that the Union would have her fired if she did not sign with the Union, attend meetings or vote for the Union. Frye identified Brown as the leader of the Union based on her belief that he wanted a union at the Employer and was active in talking up the Union to employees. Frye agreed, however, that Brown is a full-time employee of the Employer and is not employed by the Petitioner. Frye also testified that co-worker Fenton Chester told her in front of other employees at lunchtime in Franklin Park in Washington, D.C., that she would lose her job if she did not sign with the Union or vote for the Union. Frye stated, however, that prior to the scheduled election she learned that neither Brown nor the Union could get her fired.

Eileen Andary, Director of Administration for the Employer, testified that after the election was completed the Employer sought volunteers to provide information to support allegations lodged by employees that union supporters engaged in acts of harassment and intimidation during the election campaign. The employees who agreed to participate were provided safeguards that no reprisals would be taken against them and their participation was strictly voluntary. One of the employees who provided information to the Employer was Frye. On July 31, Frye met with Andary and provided information about her interaction with Brown and other supporters of the Union concerning events that occurred prior to the election. A second meeting occurred in early August 2009, where Andary took notes and apprised Frye that she would prepare a statement that Frye could review and make any changes or corrections before it would be submitted to the Board in the event the Employer decided to file objections to the conduct of the election. Andary testified that if an employee requested a copy of their signed

statement, it was immediately provided.

On August 13, Frye was getting ready to clock out but was requested to return to the back office in order to meet with Andary. Frye was provided a typed statement summarizing their prior discussions that Andary requested that she sign after having an opportunity to review it. Frye was in a hurry to leave work and did not read the statement before she signed it (Emp Exh. 1). Andary asked Frye if she wanted a copy of the statement and Frye said no.

Frye, while on her way home, thought about why she signed something without reading it. Accordingly, Frye telephoned Andary and requested that she be provided a copy of her statement. Frye, on or about August 17, obtained a copy of her statement and after carefully reviewing it, telephoned Littlejohn and informed him that there were some things in the statement that were not true. After discussing the portions of the August 13 statement that were not accurate, Littlejohn suggested that Frye prepare another declaration that clarified the prior statement. Littlejohn had someone in his office prepare a revised statement that Frye signed on August 24 (Pet Exh. 2).

On August 31, Frye gave an affidavit to the Board in the course of the Region's investigation of the Objections to the conduct of the election filed by the Employer that summarized events regarding the threats made by Brown and other in-plant supporters, the allegations of harassment, and the execution of the prior statements (Pet Exh. 1).

Employees Norma Canales and Maria Caravate testified that on July 28, at the Martin Luther King Library in Washington D.C., co-worker and Union supporter Dagoberto Arcia told them that if they did not vote for the Union, the Union would put them out on the street, meaning that the Union would have them fired.

Administrative Specialist, Jalal Chaoui, testified that as a non-supervisory employee he has gained the trust of many of the employees and often talks with them about problems or concerns they may have at the Employer. He noted that Frye came to him once in June and twice in July 2009 to express her concerns that she was being harassed by Brown about the Union and that she was in fear of her job. Chaoui also noted that employees Ronald Calhoun and Raymond Dantzler spoke with him in July 2009 to express their concerns about their jobs and the continued harassment directed at them by Brown and other Union supporters.

Discussion

The Board applies an objective test in evaluating party conduct during an elections critical period, i.e. whether the conduct has the "tendency to interfere with the employees' freedom of choice" and "could well have affected the outcome of the election." *Cambridge Tool & Mfg. Co.,* 316 NLRB 716 (1995).

The Board, in *Janler Plastic Mold Corporation,* 186 NLRB 540 (1970), addressed a similar allegation that the petitioner threatened employees that they would lose their jobs if they did not vote for the petitioner, and held that employees could reasonably be expected to evaluate these remarks as noncoercive and not as threats.[4] Likewise, the Board followed the

[4] The Board stated: nor do we consider that a particular employee's subjective "understanding" of these remarks is competent evidence to prove a coercive or objectionable effect, since in our opinion the remarks do not reasonably have that tendency. In the first place, the vote was to be by secret ballot, under conditions safeguarded by the Board, and no

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Janler holding in *Underwriters Laboratories, Inc.,* 323 NLRB 300 (1997).

Applying these principles to the subject case, I find that the employees herein could reasonably be expected to evaluate the remarks as noncoercive and not as threats. Indeed, Frye testified that she learned prior to the election that neither Brown nor the Union could have her fired. Likewise, Director of Operations Everett Scruggs, Andary, and Chaoui informed those employees that came to them prior to the election to express fear for their jobs, that the Union could not have them fired.

Under these circumstances, I recommend that Objection 1 be overruled.

Objection 2

The Employer alleges that during the pre-election period, a number of employees including Brown constantly harassed fellow co-workers about signing a union card and attending union meetings. In addition, it was reported that Brown regularly used profanity when addressing co-workers if they did not immediately sign a union authorization card and routinely used profanity in front of employees when discussing issues related to the upcoming election. In one instance, the Employer asserts that several employees called a fellow co-worker stupid and a "stupid nigger" for not supporting the Union. Scruggs reported that about a week before the election he saw a hand written message on one of the Employer's campaign posters placed adjacent to the men's locker room that states: "fuck you BID, you all going down, hopefully to hell, with your cocksucking niggers, spics, and white trash."

Facts

Frye testified that during the authorization card signing period (prior to June 16-Emp Exh. 6), she was constantly harassed by Brown and other co-workers that supported the Petitioner about signing an authorization card and attending Union meetings, however, Frye denied that she heard Brown use profanity in the workplace. She further testified that fellow employee Lawrence Caraway told her in the presence of other employees during lunchtime in Franklin Park in Washington, DC that she had to sign with the Petitioner.

Calhoun testified that co-workers and Union supporters Jerome Coleman and Earl Garnett, male African Americans, harassed him on a regular basis about signing an authorization card and voting for the Union. In fact, these individuals called him "stupid" for not supporting the Union and Coleman told him that he was "a stupid nigger" for not supporting the Union.

Scruggs testified that about a week before the election he saw a hand written message on one of the laminated campaign posters placed by the Employer in a public area adjacent to the men's locker room (Emp Exh. 3). The handwritten message states: "fuck you BID, you all going down, hopefully to hell, with your cocksucking niggers, spics, and white trash."

Lastly, Scruggs testified that several days before the election, a manager brought employee Keith Dorsey to his office who wanted to speak with him. The employee was shaking

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evidence was offered to show that any employee had reason to believe that petitioner could ascertain how he voted. In the second place, no evidence was offered to show that any employee had reason to believe that the Employer favored the petitioner and on request was disposed to discharge any employees for voting against the petitioner.

and tearful and kept repeating, will I lose my job because of the Union thing. Scruggs assured the employee that he would not lose his job because of the Union.

Discussion

The record evidence establishes that a number of employees, particularly the in-plant supporter's committee members, were particularly aggressive during the organizing drive undertaken at the Employer. Indeed, some of these individuals were especially persistent in their efforts to make sure employees signed an authorization card or voted for union representation.

It is apparent from the testimony presented during the course of the hearing, that none of the individuals who were members of the in-plant supporters committee were paid employees of the Petitioner, received remuneration or other benefits for their efforts in attempting to organize their fellow co-workers or were singled out by the Petitioner for special training on how to solicit authorization cards from employees.[5] Indeed, Littlejohn credibly testified that he never received any reports from the Employer or employees that members of the in-plant supporters committee used strong arm tactics in attempting to organize employees or threatened employees that the Union could have them fired if they refused to sign an authorization card or vote for union representation. In fact, Littlejohn openly rejected such conduct and testified that it was neither authorized nor condoned by the Petitioner. Under these circumstances, the Employer's argument that the in-plant supporters of the Petitioner are union agents is rejected. *Cornell Forge Company,* 339 NLRB 733 (2003).[6]

With respect to the racial comments made by two African American employees to Calhoun, while such comments are inappropriate and should not be tolerated during an election campaign, Calhoun noted that as a male African American employee, such discussions and comments are not uncommon at the Employer. While he was disappointed that such comments were made, it did not dissuade him from participating in the election process. Moreover, these comments appear to be isolated as it concerns Calhoun. Likewise, it is noted that the Employer could not identify any individual that was responsible for the inappropriate remarks found on its laminated campaign poster adjacent to the men's locker room[7] nor was there any other evidence presented in the hearing regarding racial overtones in the election campaign.

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[5] See *Corner Furniture Discount Center, Inc.,* 339 NLRB 1122 (2003) and cases cited therein that enthusiastic employee activist who solicited and obtained signatures on authorization cards and served as an election observer was not a general agent of the union under the principles of actual or apparent authority, where as here, the union had its own admitted agents involved in the campaign.

[6] The Employer's reliance on the Board's decision in *Service Employees International Union Local 87 (GMG Janitorial, Inc.)* 322 NLRB 402 (1996) is misplaced. The decision in this unfair labor practice case that an individual's statements to employees that if they did not sign a union card they would lose their jobs was primarily based on the finding that the individual that made the statement was an "Employer Supervisor" within the meaning of Section 2 (11) of the Act.

[7] In *El Fenix Corporation,* 234 NLRB 1212, 1213 (1978), the Board held that a single ethnic slur by an employee nonagent was not considered objectionable, and in *Benjamin Coal Company,* 294 NLRB 572, the Board found that the union was not responsible for the racial and ethnic statements of some of its in-plant committee members when the union did not sanction or condone such statements. Indeed, no evidence was presented by the Employer in the subject case that the in-plant supporters' committee had either actual or apparent authority from the Union to make racial statements to co-workers.

Additionally, the record establishes that it was not uncommon for employees to use profanity with each other in the workplace.

Lastly, while it is unfortunate that the organizing campaign caused certain individuals to become emotional and upset, the Employer assured those employees who were concerned about their jobs, that the Petitioner had no authority to terminate employees, as that responsibility solely rested with the Employer.

For all of the above reasons, I find that the Employer has not conclusively established the underpinnings in Objection 2, and therefore, I recommend that it be overruled.

Objection 3

The Employer alleges that on July 30, when Brown served as the Petitioner's election observer, the Board Agent granted his request to make a telephone call to his doctor. After Brown made the telephone call, he took a second call from an unknown person, and told this individual the full name of the Employer's election observer.

Facts

Michael Marshall, a hospitality and safety worker of five years, served as the election observer for the Employer on July 30. Marshall testified that the Board Agent gave permission to Petitioner's election observer Brown to make a telephone call to his doctor's office during a break in the election proceedings when no employees were in the voting area. Brown left a voice mail message for the doctor and then took an incoming telephone call from an unidentified individual while the parties were still on break. Marshall overheard Brown inform the unidentified individual on the telephone that he was the Employer's election observer. Marshall immediately protested to Brown about mentioning his name but he did not raise the issue with the Board Agent, and testified that he could not be certain whether the Board Agent heard Brown's remarks.

Discussion

The evidence discloses that the identification of the Employer's observer to the unidentified caller occurred during a break in the election proceedings without the presence of any voters, and that the doors to the polling area were closed at the time the telephone call was received. Moreover, once the employees appeared in the voting area, they could readily identify Marshall as an observer for the Employer since it was common knowledge that Brown was a leading proponent in the organizational drive to elect the Petitioner as the employee's exclusive collective-bargaining representative. Lastly, revealing the name of the Employer's observer had no impact on the election nor did it prevent any employees who wanted to participate in the election process from casting a ballot.

Under these circumstances, I recommend that Objection 3 be overruled.

Objection 4

The Employer contends that on July 30, while Brown served as an observer for the Petitioner, he greeted prospective voters warmly, waved and laughed at them, and in one instance attempted to hug an employee until admonished by the Board Agent. Additionally, the Employer argues that one employee became so upset when he entered the polling area and observed Brown as an observer that he left and did not vote.

Facts

Rene Peralta, a machine operator, served as an election observer for the Employer on July 30. He testified that Brown, while acting as the observer for the Petitioner, tried to get out of his seat and embrace a prospective voter as she approached the table where they were sitting. The Board Agent informed Brown that he could not engage in that type of conduct, and Brown returned to his seat before completing the act of embracing the employee.

Peralta further testified that during the course of the election session Brown would make facial gestures at the voters but he did not speak with them. He also would look away from some of the voters as they approached the table to obtain a ballot. Peralta noted that one of the employees who entered the voting area appeared to freeze when he observed Brown sitting at the table. The employee then left the voting area without casting a ballot.

Discussion

The Board in *Sir Francis Drake Hotel,* 330 NLRB 638 (2000), held that the contacts of the Petitioner's observer with employees in the polling area did not constitute objectionable conduct because the conversations were brief, lasting from a few seconds to 1 minute, and the content of the conversations were innocuous. On the other hand, the Board in *Brink's Incorporated,* 331 NLRB 46 (2000), found objectionable conduct when the union observer acting as an agent of the Union at the time of his misconduct,[8] acted contrary to the instructions of the Board Agent who conducted the election and directly told employees how to vote. Additionally, the Union observer gave the "thumbs up" signal to a number of voters and other employees were told what the observer stated about how to vote.

Applying the above principles to the facts herein, I do not find that Brown engaged in conduct that interfered with the laboratory conditions of the election. In this regard, Brown followed the instructions of the Board agent who conducted the election and returned to his seat at the election table without embracing the prospective voter. Additionally, although Brown made facial gestures at prospective voters and often turned away when they approached the voting table, he did not engage in any conversations with them. Indeed, these employees were not prevented from voting despite Brown's actions. As it concerns the one voter who froze upon observing Brown and left the voting area without casting a ballot, no evidence was presented that Brown threatened the employee in any way or engaged in any conversations with him. Moreover, even if the employee had cast a ballot, it would not have impacted the results of the election.

For all of these reasons, I conclude that the Employer has not sustained the underpinnings of Objection 4, and recommend that it be overruled.

Objection 5

The Employer asserts that the presence of Brown sitting in the voting area as an observer for the Petitioner on July 30, intimidated prospective voters because of his leadership

[8] See *Dubovsky & Sons, Inc.,* 324 NLRB 1068 (1987). In this decision the Board did not find the observer engaged in objectionable conduct, since he did not violate the principles of *Milchem, Inc.,*170 NLRB 362 (1968), regarding communications between an observer and voters waiting in line to vote.

role in convincing employees to support the Petitioner and his continued pressure and harassment of employees throughout the election campaign.

Facts

Vivian Morgan, a hospitality worker and a five year employee, testified that when she appeared at the polls on July 30 to cast her vote, Brown gave her a severe look which caused her to become upset. While Morgan was not prevented from voting in the election, she expressed her opinion that an observer should be someone who was neutral and opined that Brown has a reputation as a bully and should not have been serving as the Petitioner's election observer. Morgan noted that on occasions she loaned money to Brown but when he ceased paying her back Morgan stopped loaning him money. Morgan noted that after she stopped loaning money to Brown, the relationship changed and Brown would ignore her. Morgan expressed her opinion that Brown was the leader of the Union because he passed out flyers to employees and encouraged employees to attend union meetings.

Discussion

The Board held in *Liquid Transporters, Inc.,* 336 NLRB 420 (2001), that objections to particular persons acting as observers must be made at the preelection conference or they are waived.

The evidence establishes that although Brown smirked at Morgan, which caused her to become upset, she overcame her uneasiness and voted in the election. Morgan acknowledged that she never officially objected to the selection of Morgan as an observer for the Petitioner, and admitted that co-worker Brown is not an employee of the Union. Lastly, Morgan testified upon learning that Brown was the Employer's designated observer at the election, that she did not find his presence inappropriate.

For all of these reasons, I recommend that Objection 5 be overruled.

Conclusions and Recommendations to the Board

Based on my findings and conclusions above, I recommend that the Board overrule the Employer's objections in their entirety and issue a Certification of Representative to the Petitioner.[9]

Dated, Washington, D.C. March 31, 2010

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Bruce D. Rosenstein
Administrative Law Judge

[9] Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, within 14 days from the date of issuance of this Recommended Decision, either party may file with the Board in Washington D.C. an original and eight copies of exceptions thereto. Exceptions must be received by the Board in Washington by April 14, 2010. Immediately upon the filing of such exceptions, the party filing same shall serve a copy upon the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this Recommended Decision.